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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-436

JAMES L. BUCKLEY, United States Senator
From the State of New York, et al,

Appellants,

vs.

FRANCIS R. VALEO, Secretary, United States Senate, et al,
and CENTER FOR PUBLIC FINANCING OF ELECTIONS, et al,
JAMES C. CALAWAY of Houston, Texas,

Appellees.

Brief of Amicus Curiae of the Socialist Labor Party in Support of the Appellants Appeal of the Judgments of the United States District Court of the District of Columbia and the United States Court of Appeals for the District of Columbia

GERAM & MULHOLLAND
ROGER R. MULHOLLAND
TONY GERAM
1703 Fifth Avenue
San Rafael, California 94901
Telephone: (415) 457-2230

VINCENT HALLINAN
345 Franklin Street
San Francisco, California
Telephone: (415) 861-1151

Attorneys for the Socialist Labor Party

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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INTEREST OF THE AMICUS CURIAE

This brief of Amicus Curiae is filed pursuant to Rule 42(2) of The Rules of the Supreme Court by consent of the parties. Amicus Curiae, the Socialist Labor Party, is an unincorporated association established in 1877, the result of a merger of the National Labor Union, the North American Federation of the International Workingman's

Association, and the Social Democratic Workman's Party, and was first known as the Workman's Party of the United States.[1]

It nominates candidates for public office on local, state, and national levels and engages in a number of activities other than those generally associated with a political party. The party publishes a weekly newspaper, THE WEEKLY PEOPLE,[2] as well as pamphlets which are distributed by mail and on street corners throughout the United States. It further holds public meetings and study groups and engages in radio and television broadcasts and commentaries.

Though it has nominated and campaigned for candidates for congress and the presidency, it has never won an election on the national, state, or local levels. It has established a political committee to accept contributions and make expenditures on behalf of a presidential candidate to be nominated at a convention convening on February 7, 1976. The nomination of a presidential candidate and his campaign are viewed by the party as another means of education of the public regarding their political, social, economic, and philosophical beliefs which can be described as Marxist-De Leonism. In essence the Socialist Labor Party adopts Marxist Analysis and applies this concept to American life.

The Committee submitted a registration to the Federal Election Campaign Committee on August 22, 1975. As the Federal Election Campaign Act subjects them to re-

1. Brissenden, *The I.W.W., A Study of American Syndicalism,* New York, Columbia University, 1919, pp. 46-47; Madison, *Critics and Crusaders, A Century of American Protest,* New York, Frederick Ungar Publishing Co., 1959 ed., pp. 449-452.

2. *The Weekly People* has been found to be a non-commercial, non-profit publication. *Long v. City of Anaheim,* 255 Cal.App.2d 191, 63 Cal.Rptr. 46 (1967).

port and disclosure requirements, the committee is interested in the outcome of the challenge of the Federal Election Campaign Statutes because disclosure requirements will inhibit their ability to obtain contributions to further their educational campaign. Secondly, the committee has concern for their inability to obtain funds from the Public Campaign Finance Fund while the major parties qualify for such aid.

SUMMARY OF ARGUMENT

I

Minor parties are required to disclose the source of campaign contributions under the Federal Election Campaign Act. Disclosure poses a threat to first amendment associational rights chilling the exercise of fundamental liberties. The threat is posed by economic and personal reprisals that contributors to unpopular causes will face upon disclosure.

The opinion of the Court of Appeals recognizes the threat and considers disclosure from minor parties as an infringement of associational right. However, the Court is unwilling to declare the disclosure provisions as applied to minority parties unconstitutional without ample evidentiary basis of infringement.

The evidentiary basis is difficult to prove and the sanctions are subtle. As irreparable harm can be done to individuals and associations prior to meeting any legal tests, the provisions should be declared unconstitutional as applied to minor parties.

The government does not have a compelling interest to require disclosure from minor parties whose role in the political process is educational and serves to validate our free society and inform the electorate. The function of the Socialist Labor Party is akin to issue-discussion groups exempted from disclosure by invalidation of provisions applicable to their exercise of first amendment rights.

The abuse aimed at by the laws is not created by or with the aid of a minor party. Though restriction of first amendment freedoms may be permissible because of the interests of the government in the integrity of elections, the least restrictive means was not employed for the legislative scheme.

II

The public financing provisions of the Federal Election Campaign Act excludes minor parties access to public funds. The standards employed to allow campaign funding are suspect classifications drawn by incumbents of the major parties, and the laws favor those two parties.

The effect is to limit the access of minor parties to public funds and thereby unduly burden their interest in the availability of political opportunity. This infringes upon the associational and free speech rights of the members of disadvantaged minor parties.

Though reasonable restrictions can be placed on first amendment freedoms the factual basis of legitimizing the restriction must be provable. The Court is obligated to apply strict scrutiny when inquiry of competing governmental interest and first amendment interests abut. If no compelling interest justifies the encroachment, the provisions must be declared unconstitutional.

ARGUMENT

I. The Disclosure Requirements of the Federal Election Campaign Act Should Be Declared Unconstitutional as Applied to Minor Parties.

Under the Federal Election Campaign Act the Socialist Labor Party is required as the major parties to disclose the names and addresses of contributors to their campaign

through audit or report. 2 U.S.C. 432, 434(B)(2), 438. 26 U.S.C. 9003(A). The disclosure required does not consider the nature, purpose, and effect the Socialist Labor Party and other minor parties have in election campaigns. The purview of the Act does not recognize the position of such a minor or minority party in the political spectrum, and the consequences of disclosure to the party, its members and sympathizers, and the political process.

A. Disclosure Poses a Sufficient Threat of Intimidation and Harassment to Minor Party Contributors to Recognize Infringement of Their Associational Rights Without an Evidentiary Basis.

The disclosure requirements pose a threat to the party, its members, and democratic principles by imposing the specter of harassment and intimidation of individuals who would support such unpopular causes.[3] Accordingly, individuals are inhibited from contributing to the campaign of the spokesman-candidate of the minor party.

In *NAACP v. Alabama,* 357 US 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1957), requiring disclosure of membership lists violated the rights of members of an organization to engage in lawful association in support of common beliefs. Although there was no contention that the membership was directly suppressed by such disclosure the consequence of suppression, intimidation, harassment, physical abuse, and loss of economic sustenance provided the basis for the unconstitutionality of the disclosure in the absence of an overriding valid state interest.

An analogous situation exists with the Socialist Labor Party being required to disclose the names, addresses, and

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3. The harassment and intimidation that concerns the individual is not from the major parties who win elections nor the public generally as the majority opinion of the Court of Appeals suspects but that from neighbors, landlords, employers, business associates, store owners, and lenders of money, etc. whose sanctions are subtle.

occupations of its contributors.[4] Through not contention of direct suppression, intimidation, harassment, physical abuse, and loss of economic sustenance can be made presently;[5] protection of first amendment rights should not only become available after the foreseen consequences have crippled individuals and associations creating a burden that endangers the efficiency of the association, and the beliefs of its members and sympathizers.

The recognition of the threats posed by disclosure to contributors to controversial candidates without an evidentiary basis was accepted by the court in *Stoner v. Fortson,* 379 F.Supp. 704 (N.D.GA 1974). However, the court decided that there was a compelling state interest for disclosure, and a substantial connection between the disclosure sought and the purpose for which disclosure was required that made infringement of associational rights permissible.

In *Stoner* the threatened infringement was based on disclosure of contributors to a controversial candidate. No rational demarkation can be made between controversial and noncontroversial candidates to permit decision prior to evidentiary findings of the harassment, physical abuse, and loss of employment feared from disclosure that would provide consistent treatment. A standard can be

4. Even if contributions under $100.00 are not reportable as the Act requires recording of the contributor of $10.00 or more which is subject to audit, there is no guarantee of confidentiality for the contributor.

5. The Socialist Labor Party has a policy of disclosing in their paper, *The Weekly People,* contributions unless anonymity is requested. Though no evidence can be presented with regard to threats of FECA disclosure, the Party can provide evidence of such feared activity in relation to contributors generally and prior to this disclosure.

established when a line is that between major and minor parties thus obviating the need for an evidentiary hearing.[6]

The evidentiary basis of infringement feared from disclosure cannot readily be proved. In order to do so the party must require members to publicize that which will foster the reprisals they seek to avoid. It is difficult to prove economic or other reprisals because the sanctions are subtle. Prior to meeting a legal test to justify the unconstitutionality of disclosures provisions, great injury could be done to the organization.[7]

B. The Role and Effect of Minor Parties in the Political Process Does Not Require Disclosure to Insure Valid State Interests.

United States v. Harriss, 347 US 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) supports the view that interference with first amendment freedoms is permissible if disclosure requirements infringe such rights as long as valid and paramount state interests indicate the choice of state interests over first amendment freedoms. However, in *Harriss* paid lobbyists were required to disclose the source of their funds, or in other words, their clients. The situational context was commercial and distinguishable from contributions to a candidate for public office, especially a candidate whom is unlikely to be elected.

The scrutiny that an elected official will receive avoids in large measure the need for disclosure of his campaign contributors. It is unlikely that contributors to minor parties will be doing so to buy any favors. Accordingly, the

6. Bazelon Dissent, Unpublished Opinion, Buckley vs. Valeo, page 1593.

7. Bazelon Dissent, supra, Page 1595; Harvard Law Review, Vol. 88, Number 6, April 1975, Pages 1248-1249.

abuse that the Federal Election Campaign Act seeks to eradicate is not present in the case of a minor party such as the Socialist Labor Party.

The abuse is one created by the major parties for which minor parties will suffer the detriments attendant on loss of associational freedom. The history of the Socialist Labor Party demonstrates that no candidate nominated for any elective office has ever won. It is doubtful that the abuse aimed at by the disclosure provisions of the Federal Campaign Act is operative under this circumstance.

The purpose and role of minor party candidates are primarily educational in the context of our politics. Minor parties validate our free society and inform the electorate. Inspite of their lack of fiscal ability they provide a guide for major party candidates of minority views which may influence the candidates programs. This, of course, may not always be true, and recent experience has indicated independent candidates can influence elections.[8] For the remainder of minor parties the possibility of influencing elections is non-existent because of a lack of funds sufficient to enable them to gain political parity with the major parties.

In the 1972 presidential and vice-presidential campaign the Socialist Labor Party Committee expended contributions in the amount of $106,261.41 on behalf of their candidates.[9] They had limited access to media during the 1972 campaign and on their only broadcast with an ABC radio network commentary, only six of the networks affiliates carried the show. The Party has never won any election campaign. Accordingly, the campaign is regarded as educational activity where the views of the Socialist Labor Party may have the opportunity to enter the forum of public debate.

8. e.g. George Wallace Campaign of 1968.

9. This amount is less than ½ of 1% of the funds the Act authorizes for expenditures on a presidential campaign.

C. There Is No Compelling State Interests Sufficient to Justify Disclosure by the Socialist Labor Party.

The Party relies upon their campaign funds to carry on an equally important educational activity to the publication of their newspaper. The number of members and sympathizers is small, and when limited to under $100.00 to avoid disclosure it is unlikely if the candidates will have sufficient funds to establish an organization to permit active campaigning in a meaningful manner. Traditionally larger contributors to the Socialist Labor Party candidates own businesses, and though supportive of the views of the Party realize that an association of their business and the Party will bring economic detriment. In other instances partners of contributors do not want the association, and consequently contributions from these sources will be curtailed or cease.

The majority opinion of the Court of Appeals recognizes that disclosure may prompt reduction of contributions to minority parties and that so far as unpopular minor parties are concerned, disclosure does indeed infringe their first amendment freedom to associate to advocate unorthodoxy. Citing *Sweezy v. New Hampshire,* 354 US 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1954). However, the majority views the disclosure requirements as a reasonable restriction of such rights validated by the state interests in avoiding campaign abuses and insuring the confidence of the American public in the political process. Further, they present the "Stalking Horse" theory in which people influence the election of their candidates by eco-

nomically supporting exempted minority parties who will theoretically reduce the votes of the candidate the contributor opposes.

Though not allowing the supposed threat of infringement of first amendment freedoms to invalidate the disclosure requirements, the majority has employed the supposed threat of the "Stalking Horse" to support the view that compelling state interest necessitates the restriction of constitutional liberties. The "Stalking Horse" theory is unrealistic when applied to the Socialist Labor Party because of their limited ballot access and inability to register any significant voter response.

When government restriction stifles the exercise of fundamental liberties the least restrictive means to satisfy legitimate interests must be chosen as a legislative scheme. *Shelton v. Tucker,* 364 US 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). Judge Bazelon has proposed criminal sanctions as a less restrictive remedy for the state without infringing constitutional rights to stable the "Stalking Horse". This supposed threat could be remedied by establishing a monetary ceiling of contributions that would require reporting if an effectual amount of campaign funds are collected.[10] In order for the "Stalking Horse" theory to become meaningful the amount of funds a candidate and minor political party would require to effect an election would be substantially more than the amount of contributions the committee of the Socialist Labor Party will receive; which they hope to be similar in an amount to the 1972 campaign. As the

10. Among the solutions to fashioning disclosure requirements to insure associational rights is an alternative that only after election would disclosure be required. Of course, a definition of minor or minority party would first be required. See Footnote 1 of Bazelon Dissent, *Buckley v. Valeo,* p. 1593.

problem does not exist without substantial funds it is difficult to justify infringement of associational rights of non-monied parties.

The opinion of the Court of Appeals has declared Section 437A of the Act unconstitutional because of its application to "issue discussion" groups such as New York Civil Liberties Union as requiring disclosure of their non-partisan political activity. There is no effective difference between the New York Civil Liberties Union and the Socialist Labor Party in terms of their political activities other than the nomination of candidates to run for elective office. In fact the Civil Liberties Union, and other groups such as Common Cause and the League of Women Voters may have more influence upon elections than the partisan Socialist Labor Party due to such factors as their funding, organization, and media access. Minor parties share more characteristics with issue-discussion groups than they do with the major parties.

The opinion acknowledges only that these groups may be subject to disclosure requirements as the provision could exact information that would substantially infringe the associational rights of the members of organizations taking public stands on public issues. The purpose and function of such groups and the Socialist Labor Party is educational, and though the party nominates candidates for public office its effect is no different than issue-discussion organizations as it has not won any election in the almost 100 years of its existence. Further, as it obtains a small percentage of the vote it is unlikely to influence the election of any other candidate.

The Party through its newspaper, The Weekly People, will besides discussion of public issues, public officials, political leaders, and candidates endorse its candidate for

president. Due to such advocacy the Party would be required as Human Events to report under Section 437A. Further, under 2 U.S.C. Section 434(E) the Party as well as the Committee will be subjected to report requirements due to such advocacy in their newspaper.[11]

The advocacy there involved appears no different than the advocacy of *United States v. National Committee for Impeachment,* 469 F.2d 1135, 18 ARF 925 (1972). The funds of the Socialist Labor Party and the Committee will be segregated. The activities that the Party will have in the election year will be the same as any non-election year. The only exception will be that the spokesman at activities will be the candidate instead of the Secretary of the Party who will perform the educational function of the Party.

The disclosure requirements present a burden to minor parties not only because of its associational infringement. It further burdens the minor party's hard pressed resources, financial and human, to interpret the provisions, compile the records, and obtain legal counsel to comply with the reporting requirements of the law. A large percentage of manpower and funds is already consumed by attempts to qualify for ballot access. Thereby, the effective advocacy of the minor party position is endangered. However, this problem is not equivalent to the burden that disclosure creates on associational right, but is part of that greater burden.

In essence, the justification for disclosure from minor parties is circumspect because minor parties take clearer positions than the major parties, and their role is such that a list of contributors is unlikely to receive publicity. However, contributors will feel endangered by disclosure

11. See *Buckley v. Valeo* Opinion, p. 1551.

because of the unpopularity of minority party views. Without funds to organize, the effectiveness with which their positions can be advocated is compromised, and the burden may stifle the unpopular view. Though disclosure of the major parties contributors may reduce the volume of speech, disclosure of the minority parties could eliminate their speech.[12]

II. The Standards to Obtain Public Financing of Campaigns Discriminate Against Minor Parties in Violation of the Constitution.

The public financing provisions of the Federal Election Campaign Act were passed to lessen the influence of private money and therefore large donors on the election of public officials. The Act is a response to past campaign abuse and indiscretion, and as no solicitation of campaign funds is necessary the corruption and favor buying should be discouraged if not eliminated. Minor parties felt that the public financing of campaigns would facilitate the election of those individuals and parties without substantial funds and with limited ballot access. 26 U.S.C. 9008(E). Due to the qualifiation requirements for funding no minor party as the Socialist Labor Party can qualify for campaign funds.

In order to meet the definitional requisites of a candidate for president, a minor party nominee must have his name or presidential electors on the ballots of ten states. 26 U.S.C. 9002(2). In 1972 the Socialist Labor Party did qualify for ballots in eleven states via the presidential elector alternative.[13]

12. Harvard Law Review, Volume 88, Number 6, April 1975 p. 1247.

13. The Socialist Labor Party qualified for ballot access in the states of Colorado, Illinois, Indiana, Iowa, Michigan, Minnesota, New Jersey, New York, Ohio, Virginia, Washington, and Wisconsin.

It would appear that the Party will be able to satisfy this threshold requirement for funding. It should be understood that numerous minor parties will not be able to satisfy this requirement. The Socialist Labor Party has been able to obtain ballot access in the past by devoting a disproportionate amount of manpower and finances to insure this limited amout of inclusion in the political process.

The standards to obtain payments are wedded to the proportion of popular votes obtained by a party in the former election or contribution requirements impossible for a minority party to meet. 26 U.S.C. 9004 (A)(2)(A). The standards absent factual implications are not objectionable per se. However, when it is understood that the only two parties that could qualify for full funding by obtaining in excess of 25% of the popular vote is the Democratic and Republican parties, and the only other party to qualify for proportional funding is the American Independent Party by receiving between 5% and 25% of the vote; and no other party qualifies for funding as no minor party received over 5% of the vote, the standards as drawn unfairly exclude minor parties in violation of the Fifth Amendment. *Lubin v. Parnish,* 415 US 709, 94 S.Ct. 1315, 39 L.Ed.2d 630 (1974). 26 U.S.C. 9002 (6)(7)(8).

Under this system a minor party is locked into a secondary role, and because of previous lack of success at the polls, which stems partly from ballot access restrictions, a minor party will not be provided with the monetary ability to change their position. *Kusper v. Pontikes,* 414 US 5, 94 S.Ct. 303, 39 L.Ed.2d 7 (1973). Instead the parties that need funds the least will be receiving the benefits of public financing. This discrimination should be viewed with strict scrutiny. *Chicago Police Department v. Mosley,* 408 US 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

The state does appear to have a valid interest in maintaining the integrity of its elections, *Storer v. Brown,* 415 US 724, 94 S.Ct. 1274 (1974); *Jenness v. Fortson,* 403 US 431, 91 S.Ct. 1970, 29 L.Ed.2d 5541 (1971), and the state is not obliged to finance the efforts of every nascent political group. *American Party of Texas v. White,* 415 US 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). However, alternatives to access must be provided, *Bullock v. Carter,* 405 US 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), and the state must demonstrate that a compelling interest requires the regulations imposed, *Williams v. Rhodes,* 393 US 23, 89 S.Ct. 5, 21 L.Ed.2d 2124 (1968), and *NAACP v. Button,* 371 US 415, 83 S.Ct. 328 (1963).

The standards for sharing in the government subsidy of election campaigns are inherently suspect classifications. The standards were drawn by incumbent members of the major parties, and the laws definitely favor those two parties. Discrimination against minor parties occurs because the governmental interest is not achieved in a manner that does not unnecessarily burden a minor parties interest in the availability of political opportunity. *Lubin v. Panish,* supra. The government has discriminated against minor parties by framing the law to exclude them from funds it appears they can qualify for under the public financing sections of the Act in derogation of associational and free speech rights. *Williams v. Rhodes,* supra.

The analogous ballot access cases cited are determined on a consideration of the procedure employed to regulate or provide equal treatment. Depending upon how much factual discrimination, and therefore burden is placed on the constitutional litigant the interest of the government or of the litigant is validated.

When first amendment freedoms are involved the government may not only have to permit their exercise but provide facilities. *Healey v. James,* 408 US 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). This should be prescribed because the public financing provisions violate constitutional safeguards by the discrimination promoted with suspect classifications, and the undue burden of access standards for minor parties. Though there is no obligation to support every nascent political group, the laws cannot be drawn in a manner that instead of maintaining the integrity of elections, maintains the two-party system.

CONCLUSION

For the foregoing reasons your Amicus Curiae, the Socialist Labor Party, respectfully requests that the judgments of constitutional questions 6, 7(A), 7(B), and 7(D) of the Court of Appeals be reversed.

ROGER R. MULHOLLAND
TONY GERAM
VINCENT HALLINAN
Attorneys for the
Socialist Labor Party